Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1973

NO. 74-1971

ROBERT LEROY STUDER, *Petitioner*

v.

STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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SUBJECT INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
Argument	8
Conclusion	11
Certificate of Service	12
Appendix A	13
Appendix B	15

LIST OF AUTHORITIES

CASES

	Page
Avery v. Alabama, 60 S.Ct. 321	8
Chalk v. Beto, 429 F.2d 225 (5th Cir.)	8
Herring v. Estelle, 491 F.2d 125 (5th Cir., 1974)	9
King v. Beto, 429 F.2d 221 (5th Cir.), cert. den. 401 U.S. 936	8
MacKenna v. Ellis, 280 F.2d 592, 599, cert. den. 368 U.S. 877	8, 9
McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 24 L.Ed.2d 763	11
United States v. Richard M. Nixon, ____U.S.____ (1974)	8

UNITED STATES CONSTITUTION

Sixth Amendment	2, 8
Fourteenth Amendment	8

TEXAS CODE OF CRIMINAL PROCEDURE

Article 29.06	2, 5, 7
Article 29.07	3, 5, 7
Article 29.08	4, 7

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Robert Leroy Studer, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Texas entered in the above entitled case on April 17, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Criminal Appeals printed in Appendix A, hereto, *infra*, p. 13, and is reported in _____ S.W.2d _____.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on April 17, 1974. Petitioner's Mo-

tion for Leave to File a Motion for Rehearing was denied by said Court without written opinion on May 15, 1974. On August 13, 1974, Mr. Justice Powell extended the time in which to file a petition for a writ of certiorari to and including August 30, 1974. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Where the petitioner was represented in the trial court by counsel of his own choosing, will the gross incompetence of such counsel be adequate grounds for asserting a violation of the Sixth Amendment guarantee of effective assistance of counsel? This question, involving one of the most fundamental rights vouchsafed to a defendant facing criminal prosecution in our society, received merely perfunctory treatment by the Court of Criminal Appeals. It held merely that ". . . ineffective assistance of retained counsel cannot be imputed to the State . . ."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

Art. 29.06 of the Texas Code of Criminal Procedure provides:

In the first motion by the defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state:

1. The name of the witness and his residence, if known, or that his residence is not known.

2. The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for, a subpoena, in cases where the law authorized an attachment to issue.

3. The facts which are expected to be proved by the witness, and it must appear to the court that they are material.

4. That the witness is not absent by the procurement or consent of the defendant.

5. That the motion is not made for delay.

6. That there is no reasonable expectation that the attendance of the witness can be secured during the present term of court by a postponement of the trial to some future day of said term. The truth of the first, or any subsequent motion, as well as the merit of the ground set forth therein and its sufficiency shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right. If a motion for continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the motion was of a material character, and that the facts set forth in said motion were probably true, a new trial should be granted, and the cause continued or postponed to a future day of the same term. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 29.07 of the Texas Code of Criminal Procedure provides:

Subsequent motions for continuance on the part of the defendant shall, in addition to the requisites in the preceding Article, state also:

1. That the testimony cannot be procured from any other source known to the defendant; and

2. That the defendant has reasonable expectation of procuring the same at the next term of court. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 29.08 of the Texas Code of Criminal Procedure provides:

All motions for continuance on the part of the defendant must be sworn to by himself. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

STATEMENT OF THE CASE

Petitioner, a minister of the Gospel at St. Paul's New Testament Church in Houston, Texas was convicted on September 5, 1972, in a jury trial of the offense of fondling a minor male, and the jury assessed his penalty at 15 years in the Texas Department of Corrections. On the morning of the trial, Petitioner's counsel, Walter Conway, not then licensed to practice law,* filed a motion for continuance (his third, the first two having been granted on April 19, 1972, and July 5, 1972, respectively) based upon the fact that *none* of the nine witnesses he had subpoenaed on August 28, 1974, (nine days before the scheduled trial) had appeared in Court. Whether the subpoenas so applied for were

* It is illuminating to note that Mr. Conway has maintained neither a law office nor a telephone listing as an attorney for at least five years.

not served, or whether they were simply disobeyed, is unclear, and apparently outside the record. But because said continuance motion wholly failed to meet the statutory requirements of Art. 29.06 and 29.07 of the Texas Code of Criminal Procedure, the trial judge ordered Petitioner to stand trial forthwith. For the convenience of the Court, Petitioner's Motion for Continuance is quoted verbatim:

In The
DISTRICT COURT
Harris County, Texas
174th Judicial District

No. 172767

STATE OF TEXAS

v.

ROBERT LEROY STUDER

DEFENDANT'S MOTION FOR CONTINUANCE

To The Honorable Judge Of Said Court:

Comes now the Defendant, Robert Leroy Studer, appearing on this the 5th day of September, 1972 A.D. in the above styled and numbered cause, and respectfully moves the Court to grant a continuance in said cause for the reason that Defendant cannot safely go to trial in that, although he requested and applied with a verified application for 9 witnesses to be subpoenaed in said cause to appear on this the 5th day of September, 1972 A.D., that none of said witnesses has appeared, either because they have not been served, or because they have been served and have not obeyed the subpoena. Defend-

ant's said application for issuance of subpoenas was timely, being filed on August 28, 1972 A.D., nine days before trial. All of the witnesses but one are located here in Harris County, Texas, and some were previously subpoenaed and in Court.

Defendant says that he cannot safely go to trial without these witnesses; that their testimony is believed to be material to his cause; that this motion is not being made for delay or dilatory purpose, but is in good faith, and is made so that justice may be served, and so that Defendant may safely go to trial.

WHEREFORE, PREMISES CONSIDERED, Defendant prays the Court to continue this said cause, so that the attendance of the said witnesses can be procured.

Respectfully submitted,

WALTER CONWAY
Walter Conway,
attorney for Defendent

STATE OF TEXAS

COUNTY OF HARRIS

Before me, the undersigned authority, on this the 5th day of September, 1972 A.D., personally appeared Robert Leroy Studer, Defendant in the above styled and numbered cause, who being by me duly sworn, upon his oath stated that the facts alleged in the foregoing motion for continuance are true.

W. Pastor, Clerk.
In and for Harris County, Texas
174th Judicial District

Sept. 5, 1972 Defendant's 3rd Motion for Continuance denied.

E. B. Duggan, Judge.

In said Motion, Petitioner's trial counsel failed to state the names of the witnesses to be called, the diligence that had been used to procure their attendance, the facts which were expected to be proved by each witness, that the witnesses were not absent by the procurement or consent of the Petitioner, that their testimony could not be procured from any other source known to the Petitioner, etc., all of which, and more, were required by the said Articles 29.06, 29.07, and 29.08.

Forced to go summarily to trial, Petitioner's trial counsel was unable to obtain *any* witnesses in Petitioner's favor *during* the trial. The four-year-old boy who was allegedly fondled by Petitioner was ruled incompetent to testify *on the Court's own motion—without being so requested by Petitioner's counsel.* Petitioner's counsel made not the slightest effort to *attempt* to challenge the competence of the subject's six-year-old sister, as noted in the opinion of the Texas Court of Criminal Appeals. She testified, in response to leading questions of the prosecutor, that on the day in question she and her brother were in the trailer home of a babysitter, and were playing outside when the Petitioner invited them into his neighboring trailer home for some candy. Inside, she said that Petitioner fondled her brother by putting his "huevito" into her brother's back and by placing his hand on her brother's "huevito." Upon this testimony, the jury convicted Petitioner and assessed his 15-year penalty. Appeal was duly taken by other counsel to the Court of Criminal Appeals of Texas, the principal contention therein being incompetent trial counsel. The Texas Court did not remotely assert that Petitioner's trial counsel *was* competent, or reasonably effective, but deftly avoided the issue by holding only that ". . . ineffective assistance of

retained counsel cannot be imputed to the State . . ." Petitioner then retained his present counsel, who filed a Motion for Rehearing, urging once again the inexperience and incompetence of trial counsel as his *sole* ground for rehearing, but the Texas Court denied the motion without written opinion. See Appendix "B", p. 15.

ARGUMENT

This Court has held in innumerable cases, and with unbroken consistency, that ". . . the demands of due process of law in the fair administration of criminal justice . . ." are "fundamental." *United States v. Richard M. Nixon,* ____ U.S. ____ (1974). Certainly among these demands are the right to constitutionally satisfactory services from a defendant's trial counsel. If such counsel does not meet the minimum standards of effective assistance, a defendant is clearly denied a right which, being basic to a free society, the Courts have a logical duty to enforce. It is axiomatic that the particular circumstances of each individual case must be considered in determining whether an accused has been denied the effective assistance of counsel guaranteed by the 6th and 14th Amendments of the United States Constitution. *Avery v. Alabama,* 60 S.Ct. 321; *Chalk v. Beto,* 429 F.2d 225 (5th Cir.); *King v. Beto,* 429 F.2d 221 (5th Cir.), cert. den. 401 U.S. 936.

The test to be applied in determining whether counsel has provided constitutionally satisfactory services is not uniform throughout the Circuits, some holding that the criterion is whether the trial is a farce and a mockery of justice. But in the Fifth Circuit, it is the "reasonably effective assistance" standard of *MacKenna v. Ellis,* 280 F.2d

592, 599, cert. den. 368 U.S. 877. There, the Court said:

> "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance."

In *Herring v. Estelle*, 491 F.2d 125 (5th Cir., 1974), the Court thought that the two tests could be reconciled, saying:

> "The governing standard is reasonable effective assistance. One method of determining whether counsel has rendered reasonably effective assistance is to ask whether the proceedings were a farce or mockery. The farce-mockery test is but one criterion for determining if an accused has received the constitutionally required minimum representation (reasonably effective assistance). See Bendelow v. United States, 5th Cir. 1969, 418 F.2d 42, 50, cert. den., 91 S.Ct. 379. . . . One may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery. United States v. Edwards, 5th Cir. 1974, 488 F.2d 1154 at 1164, 1165. Other circuits may adhere solely to the farce-mockery test, but we do not. Pennington v. Beto, 5th Cir. 1967, 377 F.2d 950, 957-958. Our standard is reasonably effective assistance."

In applying these considerations to the instant case, it is helpful to consider, *seriatim*, the grievous blunders that Petitioner's trial counsel committed so that his claim of ineffective counsel will not be considered as rhetorical or lightly made:

(a) a failure or inability to subpoena witnesses thought by Petitioner to be vital to his defense;

(b) a failure or inability to file a satisfactory motion for continuance, so as to afford Petitioner an opportunity to obtain said witnesses in his favor for a subsequent trial;

(c) a failure, due presumably to "trial paralysis", to contact said witnesses by telephone for trial, when it appeared that the trial judge would demand trial of the Petitioner forthwith on the scheduled date;

(d) a failure, or inability, to challenge the competence of the six-year-old witness whose testimony was the *only* direct evidence introduced against Petitioner;

(e) a failure, or inability, to bring in any witnesses, even character witnesses, to testify on Petitioner's behalf, even though Petitioner was then a minister of the gospel at St. Paul's New Testament Church in Houston, Texas;

(f) a gross misconception of trial strategy in not having his client, the Petitioner, take the witness stand in his own behalf, even though Petitioner had denied committing the offense charged, and had no previous convictions, *either felony or misdemeanor,* within the preceding ten years.

Surely by any standard, Petitioner was entitled to rely on his attorney—*at the very minimum*—to bring in his church parishioners as witnesses to his character, or to alert them to be prepared to come to court on the date scheduled for trial. *This is not judging a lawyer by hind-*

sight. Such a gross lack of diligence amounts to a failure to exercise reasonable competence, even to the point of reducing the trial to a farce and a mockery of justice. It was clearly not ". . . within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 24 L.Ed.2d 763.

The Texas Court of Criminal Appeals blandly dismisses such gross incompetence because the counsel was of Petitioner's own choosing. The necessary effect of such judicial passivity is to *ignore* the constitutional demand that the accused shall have *effective* assistance of counsel, which means more than perfunctory, inexperienced, bungling, and incompetent representation. Petitioner submits that it means at least that the trial judge shall not, *actively or passively,* permit the accused to be deprived during the trial proceedings of the basic rights to which he is entitled by the "Due Process Clause" of the Fourteenth Amendment. A trial judge should be directed to ensure that the fundamental rights of an accused—among them, the right to subpoena witnesses in his favor and the right to challenge the competence of a *crucial* child witness—are protected, even from the slovenliness or incompetence of his own lawyer.

CONCLUSION

Because this case presents sharply the question of appropriate judicial policy in criminal cases where the accused is not represented by reasonably competent counsel of his own choice, and which policy is at variance

among the several Circuits, this Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

BEN G. LEVY
Attorney for Petitioner
2244 W. Holcombe Blvd.
Houston, Texas 77025
713/665-7824

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of August, 1974, a copy of the foregoing Petition for the Writ of Certiorari was served upon counsel for Respondent, the Hon. John L. Hill, Attorney General of Texas, by mailing a copy thereof to him at P. O. Box 12548, Capitol Station, Austin, Texas 78711, through the United States Mail, postage prepaid.

BEN G. LEVY

APPENDIX A

ROBERT LEROY STUDER, Appellant

NO. 48,028 vs. Appeal From Harris County

THE STATE OF TEXAS, Appellee

OPINION

The appellant was convicted of the offense of fondling. The jury assessed his punishment at 15 years' imprisonment.

Appellant's first ground of error contends that the evidence was insufficient for the reason that the State's eyewitness, a six-year-old girl, contradicted herself in her testimony. The victim, a four-year-old boy, was ruled incompetent to testify.

We note initially that appellant made no challenge to the competency of the six-year-old witness (the victim's sister).

The little girl testified that on the day the offense occurred, she and her brother, the victim, had been taken by their parents to a babysitter. The babysitter and appellant resided in neighboring trailer houses.

The witness testified that she and her brother were playing outside when the appellant invited them into his trailer and offered them candy. They accompanied him, and once inside, appellant removed his trousers and pulled down the victim's pants. The witness stated that she saw appellant put his "huevito" into her brother's back and put his hand on her brother's "huevito." Later testimony revealed that the witness used the the term "huevito" to refer to the private parts.

Appellant contends that the testimony of the witness was conflicting and unreliable. However, it is well established that the credibility of a witness is a matter for the jury to determine. See Pizano v. State, 489 S.W.2d 284 (Tex. Crim. App. 1973) and Angle v. State, 486 S.W.2d 308 (Tex. Crim. App. 1972). Appellant's first ground of error is without merit.

Appellant's last two grounds of error urge that he received ineffective assistance of counsel at his trial. These contentions are based upon counsel's failure to properly request a continuance to obtain missing witnesses, and upon the fact that at the time of trial, counsel had not paid his bar dues and was therefore not a member in good standing of the State Bar of Texas. The record reveals that appellant's trial counsel was retained.

With regard to counsel's improper request for continuance, no error is presented. It is settled that the ineffective assistance of retained counsel cannot be imputed to the State. See Kincaid v. State, 500 S.W.2d 487 (Tex. Crim. App. 1973) and cases there cited.

With regard to appellant's contention that his counsel was not a member in good standing of the bar, reliance is had upon Martinez v. State, 318 S.W.2d 66 (Tex. Crim. App. 1958). This decision was expressly overruled in Hill v. State, 393 S.W.2d 901 (Tex. Crim. App. 1965). That decision effectively answers appellant's third ground of error.

The judgment is affirmed.

PER CURIAM

(Delivered April 17, 1974)

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, May 15, 1974

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the Appellant's Motion for Rehearing in Cause No. 48,028,

ROBERT LEROY STUDER

vs.

THE STATE OF TEXAS, Appellee.

Sincerely yours,

GLENN HAYNES, Clerk